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CASE NO. 93-1101

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1993 TERM

Ann Brunet and Denise Sachs, on behalf of themselves and the class they represent,
Petitioners,

and

Guy E. Tucker, James T. Meyer, Stuart J. Tudor, and Joseph S. Hilleary, on behalf of themselves and the class they represent,
Respondents,

v.

City of Columbus, Ohio, Columbus Civil Service Commission, Dana Rinehart, Alphonse Montgomery,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

Respondents Guy E. Tucker, *et al.* and City of Columbus, *et al.* (hereinafter Respondents)[1] urge this Court to ignore the conflict among circuits as to the appropriate standard of scrutiny to be applied to gender based discrimination cases and this Court's prior holding in *Mississippi University for Women v. Hogan,* 458 U.S. 718, 102 S.Ct. 3331 (1982), establishing the use of the intermediate standard in cases of gender bias under the Fourteenth Amendment. Petitioners submit that the conflict cannot be ignored, and the Court is obliged to address this issue.

Respondents do not disagree with Petitioners that there is a conflict among the Circuits in the standard for proving that a gender-based affirmative action decree is valid. Instead, they argue that under any standard of scrutiny, the 1989 consent decree would not be upheld. Respondents are wrong. First, it is impossible to predict how lower courts would have evaluated the evidence if the courts had used the intermediate standard; i.e., if they had looked at whether there was a substantial relationship between the minimal affirmative action decree in the case at bar (hiring 2% - 5% women) and the objective of reducing the undoubted underrepresentation of women in the Columbus Division of Fire. Second, respondents ignore the evidence in the record below of past and

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[1] Where necessary for clarity, petitioners will refer to the *Tucker* respondents as intervenor-respondents.

continuing discriminatory selection procedures. Indeed, respondents do not dispute any of the facts of prior discrimination which support the 1989 consent decree.

For example, although it is undisputed that the City had in place a written policy excluding women from applying to become firefighters until nine years before the underlying litigation was filed, the court of appeals found this evidence too remote. Even though the evidence was undisputed that after the City was required to allow women to apply for the job, it began a more strenuous testing procedure which systematically removed women from consideration (and it is undisputed that the City knew this would be the effect), the court of appeals isolated this evidence from the prior written policy against women and found that this discrimination had been remedied.

There was also undisputed evidence that there was manifest imbalance of women firefighters in comparison to those who were qualified for the job. The manifest imbalance resulted from the past policy excluding women from the position of firefighter and tests that discriminated against women. Federal courts, including this Court, have routinely relied on such evidence in upholding affirmative action. The lower courts in the case at bar, by ignoring evidence of past discrimination that caused the imbalance of women in the firefighter workforce, required a much more onerous burden to justify the affirmative action than has been required by courts which have used either the intermediate or strict scrutiny standards.

Contrary to the court of appeals' characterization of the evidence, it is apparent that the long term effect of the exclusionary and discriminatory practices of the respondents resulted in the manifest imbalance. Petitioners submit that even under strict scrutiny, the evidence of past discrimination is sufficient to uphold the 1989 consent decree.

Finally, respondents suggest that *Rufo v. Inmates of Suffolk Co. Jail*, __ U.S. __, 112 S.Ct. 748 (1992), stands for the proposition that a district court may apply any standard of scrutiny it desires because it retains absolute discretion and power to modify institutional reform consent decrees, and accuse petitioners of failing to address this "essential element of this litigation." Indeed, respondents tend to rely on this "significant discretion" under *Rufo* for every argument they advance.

Petitioners have not, as suggested, ducked an essential element. *Rufo* has no application in this case for two reasons: the holding and Rule 60(B) (which it interprets) mandate that a request for modification be brought by a party to the consent decree, not an intervenor or other third party; and secondly, respondents have failed at any time in this litigation to meet the threshold burden of *Rufo*, namely a showing "that a significant change in circumstances warrants revision of the decree."

The only intimation in the record of a change in circumstances is the district court's suggestion that "[a]fter the decision in *Croson*, the invalidity of the decree should have been obvious to the City." Opinion and Order of March 18, 1992, App. at 141.

Petitioners submit that this Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989) was not the type of "significant change" referred to in *Rufo, supra*:

> To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation. . . .

Id., 112 S.Ct. at 763.

Petitioners submit that *Rufo* cannot be read so broadly as to do away with this Court's requirements for affirmative action consent decrees.

II.

Respondents argue that petitioners have rewritten the facts in the record. As previously stated, they fail to refute a single fact presented by petitioners in support of the 1989 consent decree.

Respondents do dispute the assertion that at the time of the consent decree strict rank order selection discriminated against women. Respondents, however, ignore that an injunction against strict rank order selection from the Columbus firefighters list was entered by the district court in 1986 because it

discriminated against women.[2] That injunction was in effect at the time the consent decree was signed by the lower court. Furthermore, it is uncontradicted that rank order selection from the firefighter test in 1989 (at the time of the consent decree) had an adverse impact on women and had not been shown to be job related. Therefore, under the standards in force since *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971), rank order selection discriminated against women.

Two points must be made here: rank order selection has no bearing on the lower courts' overturning of the consent decree because it was not a basis nor a factor in the determination. Indeed, although most of the evidence presented at hearing on the constitutionality of the consent decree went to rank ordering, the district court specifically did not determine the validity of rank order selection and struck down the consent decree on other grounds. Secondly, if this Court reverses the lower courts' decisions on the constitutionality of the consent decree, the after-the-fact finding in 1992 that rank order selection is job related will not disturb the consent decree.

Contrary to the respondents' assertions below, the availability of a job related testing procedure does not negate a legally enforceable affirmative action consent decree. Normally, the parties do not go to the expense and time to validate procedures once a

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[2] *Brunet v. City of Columbus,* 642 F.Supp. 1214, 1250, 1253 (S.D.Ohio), *appeal dismissed as moot,* 826 F.2d 1062 (6th Cir.), *cert. denied*, 485 U.S. 1034, 108 S.Ct. 1593 (1988).

consent decree is entered. However, even where such has occurred, it will not overcome the legitimacy of the consent decree.

III.

Respondents bring very little new to the standing issue raised by petitioners. Two points, however, require response.

First, respondents argue that important seniority rights were diminished by the consent decree, and therefore standing existed for three of the four intervenor-respondents, abandoning the argument that the fourth was likewise injured.

The evidence in the record regarding seniority is contained in the Joint Stipulations from the December, 1991 hearing on the intervenor-respondents attack on the consent decree. That stipulation reads in its entirety:

> Seniority within the Division of Fire is determined by date of appointment. This is important in any firefighter's career for a number of reasons including pay, pensions, vacation time, "Kelly Day" (or days-off work) selection, and promotions. Seniority points are awarded for years of service, which are then added to a firefighter's competitive score on promotion examinations; in case of a tie or close finish the more senior person obtains the promotion.

Joint Stipulation No. 10.

In view of this seniority policy, the evidence below is even more striking. It was undisputed that the intervenor-respondents' hire dates were unaffected by the consent decree. That is, in the total absence of the consent decree's hiring requirement, each of the intervenor-respondents would have been and, in fact, were hired on the same date due to their placement on the eligibility list. Thus, their seniority dates, and all rights and benefits derived from the dates, were unaffected by the consent decree.

The court of appeals, in an expansion beyond standing jurisprudence, found that despite this fact, intervenor-respondents suffered a dimunition in competitive status because women were hired along with the intervenor-respondents. This, the court of appeals held, was sufficient "injury" to confer standing.

Petitioners are unaware of any case by this or any other court which has found standing on similar facts. In *Northeastern Florida Contractors v. Jacksonville*, __ U.S. __, 113 S.Ct. 2297 (1993), this Court found that white contractors had standing to attack a minority set aside program because they alleged a denial of consideration for public contracts. Similarly, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978), this Court held that a white student who was denied consideration for a position in medical school as a result of an affirmative action plan had standing to challenge the plan. Neither of these cases support the court of appeals' sweeping holding.

Additionally, respondents rely on *Rufo* again for the suggestion that there is no longer a need to show

standing, in light of the district court's discretion to modify consent decrees. Such a sweeping interpretation of this case is once again ill-advised.

Unlike the sheriff in *Rufo*, the intervenor-respondents were not parties to the consent decree. Thus, neither *Rufo* nor Rule 60(b) confers on them the right to seek modification of the consent decree. Neither of the parties to the consent decree sought modification at any time prior to the lower court's finding that the consent decree was unconstitutional.

Secondly, respondents have pointed to no significant change to warrant modification, regardless of their lack of status in this matter. This Court made clear in *Rufo* that the threshold requirement is a showing "that a significant change in circumstances warrants revision of the decree." *Id.*, 112 S.Ct. at 760. While this may be done by showing a "significant change in factual conditions or in the law," *id.*, neither have been advanced in the case at bar. This Court's holding in *Rufo* remains inapplicable to these proceedings.

CONCLUSION

Respondents attempt to cast petitioners' arguments as a wholly factual dispute. While evidence is a key to this petition, it is the sufficiency of the evidence of discrimination, in light of *Croson* and its progeny, which mandate this Court's review and reversal. Unless this Court is satisfied that no affirmative action hiring plan can be supported under *Croson*, this important issue must be addressed to

rectify the wrongs herein and to provide guidance to the lower federal courts concerning such matters.

For all of these reasons, petitioners respectfully urge that this Court grant their petition and hear it on its merits.

Respectfully submitted,

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